IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 18 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHARDABEN M PATEL HEIRS OF MAGANLAL MOTIRAM PATEL
Versus
RANJITLAL MANUSKHLAL(DECEASED)

Appearance:

MS KALPANABEN BRAHMBHATT for MS VASUBEN P SHAH
for Petitioner

MR MR MENGDE for MR SN SHELAT for respondents

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 10/08/2000

ORAL JUDGEMENT

This is a Civil Revision Application filed under Sec.29(2) of the Bombay Rents Hotels & Lodging House Rates Control Act, 1947 (for short "the Act") by the original defendant/tenant challenging the correctness, legality, propriety and regularity of judgment Ex.19 dt. 14th December, 1989 rendered by the learned District Judge, Surat (who will be referred to hereinafter as the learned Judge of the Appellate Court) in Regular Civil Appeal No.12 of 1986, whereby the judgment dt. 27th September, 1985 rendered by the learned Judge, Small Causes Court, Surat (who will be referred to hereinafter as the learned Judge of the trial Court), in Rent Suit No. 39 of 1981 was reversed and by allowing the appeal, the plaintiff's suit was decreed in his favour directing the defendant/tenant to vacate the premises on or before 28th February, 1990. The learned District Judge, Surat was also pleased to direct the defendant to pay the costs to the appellants throughout and bear his own.

Being aggrieved against and dissatisfied with the said judgment Ex.19 dt. 14th December, 1989 rendered by the learned District Judge in Regular Civil Appeal No.12 of 1986, the original defendant has filed this Civil Revision Application, challenging the correctness, legality and propriety and regularity of said judgment.

2. During the pendency of this Civil Revision Application, original revision petitioner i.e. original defendant/tenant died, and therefore, his heirs and legal representatives are brought on record vide order dt. 10th August, 1990 passed in Civil Application No. 2296 of 1990. The present revision opponents were the plaintiffs in the suit. Plaintiff no.1 Ranjitsinh Mansukhlal died during pendency of this Civil Revision Application, and therefore, his heirs and legal representatives are brought on record vide this court's order dt. 11th April, 1994 passed in Civil Application No. 3074 of 1993. For the sake of convenience, the parties will be referred to hereafter as the original plaintiff and original defendant respectively at appropriate places.

3. The facts leading to this present Civil Revision Application, in a nutshell, are as follows-

The plaintiffs are the owners of the suit property described in Para 1 of the plaint. Out of the suit property, certain premises situated on ground floor as well as two rooms on first floor facing Kot Sheri, have been given on lease to defendants for standard rent at the rate of Rs.160/- per month. It is the case of the

plaintiffs that the defendant is a statutory tenant. Defendant is also liable to pay Rs.17-25 Ps. per month as permitted increases. Thus the defendant is a tenant for monthly rent of Rs. 177-25 Ps. It is the case of the plaintiffs that the defendant had taken on lease the suit premises for purpose of only carrying on business of milk. It is the case of the plaintiffs that the defendant is a tenant-in-arrears of rent for more than six months and that he has neglected to make payment of such rent due within one month from date of service of notice u/s. 12(2) of the Act. As per the case of the plaintiffs, the defendant has not paid the rent for a period from 1/1/1980 to 30/11/1980 which came to Rs. 1,949-25 Ps. It is also the case of the plaintiffs that the suit premises have not been used for a reasonable cause for the purpose for which that premises were let for a continuous period of six months, immediately prior to date of filing of the suit, and therefore, one of the grounds for seeking a decree of eviction is falling under Sec.13(1)(k) of the Act. It is the case of the plaintiffs that the defendant is allowing other persons to make use of the suit premises. It is not a specific case of the plaintiffs that the defendant has unlawfully sublet the whole or part of the suit premises or assigned or transferred in any manner his interest therein to other such third person. Anyhow, the plaintiffs have advanced their case for eviction of the suit premises mainly on three grounds viz. (i) that the defendant is a tenant in arrears of rent for more than six months, that is case falling under Sec. 12(3)(a) of the Act; (ii) that the defendant has sublet the suit premises to third person, that is case falling under Sec. 13(1)(e) of the Act; and (iii) that the defendant has changed user of the suit premises, that is case falling under Sec. 13(1)(k) of the Act. As the plaintiff wanted to file the suit on aforesaid three grounds, he, by addressing a suit notice dt. 27/11/1980, terminated the tenancy of the defendant of the suit premises. That notice was received by the defendant on 1st December, 1980. It is a specific case of the plaintiffs that the defendant had given a reply dt. 8th December, 1980 giving evasive replies. Thereafter, plaintiffs filed Small Cause Suit No. 39 of 1981 in Small Courses Court at Surat, on 09-01-1981.

The defendant appeared in the suit and contested the suit by filing his written statement at Ex.18. The defendant has denied practically all the pleadings of the plaintiff, pleaded in the plaint. He has denied the fact that previously standard rent of the suit premises was fixed. It is the case of the defendant that when the suit premises were let to the defendant, it was given for

both the purposes viz. for (i) Commercial purpose; and (ii) Residential purpose, and the defendant is using this suit premises for both the purposes within the knowledge of the plaintiffs. In short, the defendant has denied all the averments made by the plaintiffs in the plaint of the suit.

4. From the pleadings of both the parties, the learned Judge of the trial Court framed issues at Ex.20. Keeping in mind the issues framed at Ex.20, both the parties led their evidence oral as well as documentary in the suit. After hearing the arguments of the learned advocates for both the parties, and after appreciating the evidence led in the case, the learned Judge of the trial Court negatived all the contentions of the plaintiffs and ultimately, by rendering his Judgment dt. 27/9/1985, he was pleased to dismiss the plaintiffs' suit for possession of the suit premises. The plaintiffs' suit for arrears of rent and mesne profits and permitted increases total amounting to Rs.1,285/- till the date of filing of the suit was decreed. By that Judgment, the learned Judge of the trial Court fixed the standard rent at Rs.160/- per month plus education cess at Rs.17-25 Ps.

5. Being aggrieved against and dissatisfied with the said judgment dt. 27/9/1985 rendered by the learned Judge of the trial Court in Rent Suit No.39 of 1981, the original plaintiffs filed Regular Civil Appeal No.12 of 1986 in the District Court, Surat. The learned Appellate Judge, after hearing the arguments of the learned advocates for both parties, and after perusing record and proceedings of the suit, and after appreciating the evidence, accepted the case of the plaintiffs in toto on three grounds and he, by allowing the appeal filed by the plaintiffs, decreed the suit of the plaintiffs and by his Judgment Ex.19 dt. 14th December, 1989, the defendant/tenant was directed to vacate the suit premises on or before 28th February, 1990.

6. Being aggrieved against and dissatisfied with the said judgment Ex.19 dt. 14th December, 1989 rendered in Regular Civil Appeal No.12 of 1986, the original defendant has preferred this present Civil Revision Application, challenging the correctness, legality, propriety and regularity of the said judgment.

7. I have heard Ms. Kalpanaben Brahmbhatt, learned advocate for revision petitioner and Mr. M.R.Mangde, learned advocate for revision opponents. I have gone through the record and proceedings of the suit which is called for by this Court. It is settled legal principles

of law that revisional powers under Sec.29(2) of the Act are some what larger than the powers which can be exercised by this Court under Sec. 115 of C.P.Code. It is true that this Court cannot reappreciate the evidence and substitute its own finding on reassessing the evidence, but at the same time, this Court has to come to a conclusion that judgment challenged in this type of Civil Revision Application is in fact according to law or not. One has to look to the evidence, and if the Court comes to a conclusion that finding arrived at by the Appellate Judge is perverse, then certainly, it can be said that judgment is not according to law. If this Court comes to a conclusion that the Appellate Judge has not kept in mind well settled legal position with regard to relevant provisions of the Rent Act, while disposing of the appeal then this Court can certainly disturb the finding of the Appellate Judge.

8. In case of SARLA AHUJA VS. UNITED INDIA INSURANCE CO. LTD. reported in AIR 1999 SC 100, the Hon'ble Supreme Court has considered Sec.25- B of Delhi Rent Control Act, which is equivalent to Sec.29(2) of the Rent Act. That Sec.25- B of the Delhi Rent Control Act is with regard to revisional powers of the High Court. The text of provisions of Sec. 25-B of the Delhi Rent Control Act is practically similar to present Sec. 29(2) of the Bombay Rent Act. Dealing with Sec.25-B of the Delhi Rent Control Act, the Hon'ble Supreme Court has held that

> " power of the High Court is supervisory in nature and it is intended to ensure that the Rent Controller conforms to law when he passes the order. The satisfaction of the High Court when perusing the records of the case must be confined to the limitated sphere that the order of the Rent Controller is "according to law". In other words, the High Court shall scrutinise the records to ascertain whether any illegality has been committed by the Rent Controller in passing the order under Sec.25- B of the said Act, and therefore, this Court can scrutinise the record to ascertain whether any illegality has been committed by the Rent Controller in passing the order under Section 25-B."

In case of HELPER GIRDHARBHAI Vs. SAIYED MOHMAD MIRASAHEB KADRI AND OTHERS, reported in (1987) 3 SCC 538, equivalent to AIR 1954 MADRAS 182, it has been held that-

"Revisional power of the High Court under Sec.29(2) of the Bombay Rent Act is to ensure that the principles of law have been correctly borne in mind; Secondly, the facts have been properly appreciated and the decision arrived at by taking all material and relevant facts in mind. It must be such a decison which a reasonable man could arrive at; and lastly such a decision does not lead to miscarriage of justice."

9. Keeping in mind the aforesaid legal position, with regard to powers of this Court which can be exercised under Sec.29(2) of the Act, rival contentions of both the parties are dealt with.

10. The learned Judge of the Appellate Court has granted a decree in favour of plaintiffs by holding that plaintiffs have made out their case falling under three grounds; (1) under Sec. 12(3)(a) of the Act; (2) under Sec.13(1)(e) of the Act and (3) Sec. 13(1)(k) of the Act.

(1) From very beginning, it is the case of the plaintiff that defendant is a tenant in arrears of rent for more than six months and that he has neglected to make payment of such rent due, within one month from the date of service of notice. To prove a case falling under Sec.12(3)(a) of the Act, four conditions are required to be proved. As held by this Court in case of RATILAL BALABHAI NAZAR Vs. RANCHHODBHAI SHANKERBHAI AND OTHERS, reported in (1968) 9 GLR 48, following four conditions are set out-

(i) The rent must be payable by the month;

(ii) There must be no dispute regarding the standard rent or permitted increases right upto the expiration of a period of one month from the date of the notice under sec. 12(2) of the Act;

(iii) The rent must be in arrears for a period of six months or more at the date of such notice; and

(iv) The tenant must neglect to make payment of such arrears until the expiration of a period of one

month after the date of such notice.

If, in any case, one of the aforesaid four conditions is not satisfied by the plaintiffs, then case will be governed under Sec.12(3)(b) of the Act.

10.1 Now let us examine the facts of the present case to decide as to whether the plaintiffs had made out their case under Sec. 12(3)(a) of the Act or not. The first condition with regard to case falling under Sec.12(3)(a) of the Act is to prove that the rent must be payable by month. In this case, there is no dispute with regard to monthly rent of Rs.160/- per month for the premises. No doubt, the defendant has taken a dispute that rent at the rate of Rs.160/- is not the standard rent but at present for considering this first condition, the case of the plaintiff is that monthly rent is at Rs.160/- per month. In plaint, he has also stated that defendant is also liable to pay permitted increases at the rate of Rs.17-25Ps. He has kept mum in plaint for any education cess to be paid for the suit premises. It is not in dispute that both the parties had filed many civil litigations, before this suit was instituted. Present defendant had filed one Rent Application No. 1204 of 1969 against the present plaintiffs for fixation of standard rent. That matter of Rent Application No. 1204 of 1969 was ultimately compromised by both the parties on 23/2/1972. Certified copy of compromise Pursis is filed at Ex.70 in the suit. Below that compromise Pursis Ex.70, the Court passed following order:

ORDER

" Applicant and opponent are present and submit this compromise and they admit its contents. Recorded. The permitted increases of the suit premises is fixed at Rs.17.25 Ps. with effect from 1.2.1972 and education cess to be borne by the applicant from 1.4.1972."

It is the contention of Shri Mengde that when this compromise Pursis was filed, it was agreed upon to by both the parties that standard rent of the suit premises was Rs.160/- per month, and both the parties agreed to fix permitted increases at the rate of rs.17-25 Ps. Ms. Kalpanaben Brahmhatt has vehemently argued that though both the parties had stated certain facts in the compromise Pursis, at that time, Court did not pass any order fixing standard rent. The Court passed an order

fixing permitted increases at the rate of Rs.17-25 Ps. and therefore, in no case, it can be said that previously when compromise Pursis Ex.70 was filed in Rent Application No. 1204 of 1969, the Court passed order fixing the standard rent of the suit premises. Looking to the operative portion of the order below Compromise Pursis Ex.70, in no case, it can be said that on 23/2/1972, the Court fixed the standard rent of the suit premises at the rate of Rs.160/- per month. If really, it was a contention of both the parties for getting the standard rent fixed at Rs.160/- per month, the landlords/ plaintiffs could have moved that Court at the earliest to pass necessary orders with regard to fixation of standard rent because in operative portion below Compromise Pursis, there is no reference with regard to fixation of standard rent of the suit premises. It appears that no such attempt has been made by plaintiff to get appropriate corrections made in the operative portion of the order below Compromise Pursis Ex.70, and therefore, though there is a recital with regard to fixation of standard rent in body of Exh.70, and therefore, it can not be said that on 23/2/1972, standard rent of the suit premises was fixed and hence that dispute with regard to standard rent subsisted till the present suit was filed by the plaintiffs. Looking to operative portion of the order below Ex.70, the Court fixed permitted increases at the rate of Rs. 17-25 Ps. with effect from 1/2/1972. It was made clear that education cess was to be borne by the applicant i.e. defendant with effect from 1st April, 1972. Ms. Kalpanaben Brahmbhatt has argued that this permitted increases which is fixed at Rs.17-25 Ps. is including taxes and once taxes are payable yearly, the one of the components of rent is yearly payable, and therefore, that permitted increases may be treated as yearly payable because one of the components of the rent is yearly payable.

11. As against this, Shri Mengde, learned advocate for the revision opponent has cited two authorities-

(1) RAJU KAKARA SHETTI Vs. RAMESH PARATAP RAO SHIROLE, reported in (1991) 1 SCC 570, in which it is held that as under-

" Merely because the rent includes an element of municipal tax, does not mean that rent is not payable by the month. If the rent is fixed rent per month, the element of tax within such fixed rent makes no difference and such fixed rent remains the "rent payable by month".

Aforesaid principles has been reiterated by this Court in RUKSHMANIBEN WD/O KANTILAL JAGJIVANDAS V/s JAYABEN WD/O Z.M.TAILOR reported in (2000) 2 GLH (UJ) 2.

12. In view of aforesaid two authorities, if both the parties have agreed upon for permitted increases to be paid monthly, then component part of that permitted increases is also payable monthly, and therefore, even though permitted increases include taxes in this cited case, it can not be said that taxes which are included in permitted increases are yearly payable, and therefore, rent is payable monthwise.

13. As both the parties have agreed to by compromise Pursis filed in this case, the permitted increases at the rate of Rs. 17-25 Ps. is monthly payable, and therefore, even that permitted increases include taxes, that taxes are payable monthly and so to that extent, permitted increases at the rate of Rs.17-25 Ps. is monthly payable. Now question arises for education cess. Education cess is to be paid for such premises. Primarily, it is the duty of the landlord to pay education cess for such property, but there can be agreement between the landlord and the opponent for education cess. Here in this case, looking to compromise Pursis, the landlord agreed that defendant should pay education cess with effect from 1/4/1972. Now in no case, education cess is monthly payable. It is to be paid yearly, and therefore, education cess which is connected with the rent because education cess is being assessed on Annual Letting Value of such building. It is yearly payable. Annual Letting Value can be assessed on monthly rent, and therefore, education is part and parcel of the rent. Here in this case, defendant has agreed upon to pay education cess separately. It is not made clear in operative portion of order below compromise Pursis Ex.70 that defendant had to bear the education cess monthly. When education cess is yearly payable, and when it is one part of the rent, it is an yearly payable, and therefore, in this case, it cannot be said that rent is monthly payable, and therefore, first and foremost condition to bring the case under Sec.12(3)(a) of the Act is not satisfied. And therefore, decree of eviction can not sustain on that ground.

14. Second condition to bring case under Sec.12(3)(a) of the Act is to prove that there must be no dispute regarding the standard rent or permitted increases right upto expiration of period of one month from the date of the notice under Sec.12(2) of the Act. Shri Mengde has

argued that in previous Rent Application No. 1204 of 1969, standard rent had already been fixed, and therefore, now it cannot be said that defendant has dispute with regard to standard rent. As discussed earlier, there is no reference with regard to any order fixing standard rent of the suit premises, in operative portion of the order below compromise Pursis Ex.70, no standard rent was fixed previously. Ms. Kalpanaben Brahmbhatt has argued that previously, no standard rent was fixed, and therefore, dispute with regard to standard rent was subsisting till the present suit was filed. She has argued that defendant is expected to take such type of dispute of standard rent within one month. He can take such type of dispute with regard to standard rent either in reply to notice or by filing a separate standard rent application under Sec.11(4) of the Act.

15. She has cited decision of this Court rendered in case of RAMANIKLAL DWARKADAS MODI vs. MOHANLAL LAXMICHAND AND ORS, reported in (1977) 18 GLR Page 32, wherein it has been held that-

" Tenent can also claim protection by raising dispute about standard rent within one month of the receipt of the notice, and that dispute can be taken even in written statement or by reply to notice under Sec. 12(2) of the Act.

The plaintiff has categorically stated in his plaint that before filing the suit, he addressed suit notice dt. 27/11/1980 which was received by defendant on 1/12/1980. He has admitted that defendant had given a reply on 8/12/1980 giving, as per his say, incorrect facts, but he admits that defendant gave a reply to his suit notice. Plaintiff has not produced such reply. That reply which was received by plaintiff was original one. It was a primary evidence. Plaintiff ought to have produced all the relevant documents before the trial court. In this case, he has not produced that original reply received by him. Under the circumstances, now defendant can use copy of the reply which is a secondary evidence. Here in this case, Ms. Kalpanaben Brahmbhatt has drawn my attention to the document Mark 75/8. It is an office copy of reply dt. 8/12/1980. It can not be exhibited as per the provisions of Indian Evidence Act, but once it is proved that plaintiff is in possession of original reply and when they have admittedly withheld that best evidence available with them, then Court can draw an adverse inference against them, and hence Court can use secondary evidence for the purpose of considering the reply of the defendant. Mark 75/8 which is signed by

Advocate is a secondary evidence. During the course of arguments, Shri Mengde has not taken any dispute with regard to Mark 75/8, and therefore, this Court has considered that document Mark 75/8, and on reading that document, it is crystal clear that defendant has taken a dispute with regard to standard rent, and therefore, defendant has taken a dispute within one month from the date of the notice, because notice was dated 27/11/1980 and defendant has replied it at the earliest on 8/12/1980. When we find that there is a recital with regard to dispute of standard rent in Mark 75/8, then in no case, it can be said that defendant had no dispute with regard to standard rent within one month from the date of receipt of notice under Sec.12(2) of the Act, and therefore, this second condition is also not satisfied by the plaintiff.

15.1 The third condition with regard to case falling under Sec.12(3)(a) of the Act is to the effect that the rent must be in arrears for more than six months on the date of suit notice. Admittedly, there is no dispute with regard to arrears of rent for more than six months on the date of the notice. So this third condition is satisfied, but related condition No.(4) is not proved in this case.

15.2 That fourth condition is that tenant must neglect to make payment till expiration period of one month after receipt of such notice. The learned Appellate Judge has observed in his Judgment at Para 10 that it is an admitted position that the tenant has paid up entire amount or rent that was due before the judgment was pronounced, meaning thereby, defendant did not pay rent within one month after the date of such notice. So out of four conditions, first two conditions are not satisfied, and therefore, case is not falling under sec.12(3)(a) of the Act, but it falls under Sec.12(3)(b) of the Act.

16. To bring a case under Sec. 12(3)(b) of the Act, three conditions are required to be proved. This Court has set out that three conditions in case of CHHOTUBHAI ZINABHAI (SINCE DECEASED THROUGH HIS HEIRS & LEGAL LRS. GUJVANTBHAI C. DESAI Vs. ISHVERSINH MOHANSINH ATODARIA, reported in (2000) 1 GLR 115, as follows:

> "The first condition is that he should have deposited the rent on the first date of hearing of the suit, or any subsequent date as directed by the Court. The second condition is that the

tenant continues to deposit such rent or standard rent regularly in Court till the suit is finally decided. The third condition is that tenant shall pay costs of the suit as directed by the Court".

Here in this case, second condition is fulfilled by the tenant, because he has already deposited rent before the judgment was pronounced by the trial court. Hence case does not fall u/s. 12(3)(b) of the Act.

17. The defendant was not knowing as to what was the standard rent of the suit premises. For the first time, trial Court fixed the standard rent in his judgment rendered on 27/9/1985. That standard rent, according to say of the plaintiff, was Rs.160/- per month, being the rent plus Rs. 17-25 Ps. as permitted increases, plus education cess. When the learned Appellate Judge observed that defendant has paid entire amount of arrears of rent that was due, before the judgment was pronounced, meaning thereby, the defendant has fulfilled the most material condition of Sec.12(3)(b) of the Act. Hence, plaintiffs are not entitled to decree even u/s. 12(3)(b) of the Act.

18. It is well settled principles of law that once the plaintiff has filed a suit for possession under Sec.12(3)(a) of the Act, no decree can be passed under Sec.12(3)(b) of the Act, if one or more conditions for Sec.12(3)(a) of the Act are not satisfied by the defendant. In view of the observations made hereinabove, when the plaintiffs have failed to satisfy all the four conditions to bring their case under Sec.12(3)(a) of the Act, plaintiffs are not entitled to any decree on that count. In view of the above discussions and considering the legal position, the learned Appellate Judge has erred in passing the decree under Sec.12(3)(a) of the Act even though the standard rent was not fixed previously, and the rent is not monthly payable, and on that score, decree passed by the learned Appellate Judge for possession under Sec.12(3)(a) of the Act is "not according to law".

19. Second ground of the plaintiffs to have the possession is a case falling under Sec.12(3)(e) of the Act. If we read the plaint of the suit of the plaintiffs as a whole, we find that plaintiffs have nowhere pleaded that the defendant has sublet the suit premises or assigned any interest of defendant in the suit premises

to any third person. In Para 4 of the plaint, plaintiffs have pleaded that defendant is allowing other person in the suit premises. It is not the case of the plaintiffs specifically pleaded in the plaint that defendant has sublet the suit premises to any third person or defendant has assigned or transferred in any other manner his interest in the suit premises to any third person. Still however, without considering the pleadings of the plaintiffs, the learned Appellate Judge has passed the decree on the ground of subletting. When there is no specific plea in the plaint, no evidence can be considered in absence of the plea.

19.1 For a moment, if it is believed that plaintiffs have averred that it is a case of subletting, then also the plaintiffs must prove two important conditions - (i) that exclusive possession of the suit premises has been given to some other person. Here in this case, it is not the case of the plaintiffs that defendant has abandoned his possession and he is allowing some third party to stay in the suit premises. It is not the case of the plaintiffs also that some third party has been exclusively in possession of the suit premises and (ii) that exclusive possession has been given to third person for some consideration. There is not a single pleading in the plaint that defendant has taken some consideration for allowing some third party to use such premises. Under the circumstances, when there is no evidence whatsoever to prove the case under Sec.13(1)(e) of the Act, in no case, it can be said that plaintiffs have proved their case for subletting.

20. The third and last ground for plaintiffs to obtain possession of suit premises is on the ground that defendant has changed user of the suit premises. It is the case of the plaintiffs that the suit premises were given to defendant for the purpose of carrying on business of milk. Admittedly, as per Court Commissioner's report, defendant is residing in the suit premises as well as he is carrying on business in the suit premises.

21. Mr. Megde has argued that plaintiff has deposed in his evidence that suit premises were given only for carrying on business of milk, and at present, the suit premises are being used for residential purpose. It is an admitted fact that defendant is using the suit premises for both the purposes -one for carrying on business of milk and second for his own residence.

22. Ms. Kalpanaben Brahmbhatt has argued that

plaintiffs are in know of the fact regarding use of such premises for both purposes since so many years. This type of contention was taken by the plaintiffs in earlier suit which they filed in the year 1961.

23. Ms. Kalpanaben Brahmbhatt has argued that parties to the suit are litigating since 1961. In the year 1961, one Regular Civil Suit No.31 of 1961 was filed by the plaintiffs against the defendants and in that suit, it was one of the contentions of the plaintiffs that the suit premises were let only for the purpose of business and not for residence. In that suit, both the parties filed compromise purshis on 11th March, 1963. Certified copy of the said compromise Purshis filed in Regular Civil Suit No.31 of 1961, is at Ex.31. Looking to that compromise Purshis, it was one of the contentions of the plaintiffs in that suit that the suit premises are consisting of two parts. First part is a shop, and behind that shop, there are two other rooms. It was alleged in that suit that the suit premises were let to defendant nos.1 and 2 only for the purpose of carrying on business of milk i.e. for commercial purpose. It is not clear as to whether in that suit, it was one of the contentions or not that defendant nos. 1 and 2 were using the suit premises for residential purpose also. As per the decree passed by the Court on the basis of that compromise Purshis, the plaintiffs accepted defendant no.3 of that suit i.e. Mangallal Motiram Patel as their tenant.

24. It can be said that present defendant is a tenant of the plaintiffs of the suit premises since 11th March, 1963. Thereafter, again plaintiffs filed one another suit bearing Regular Civil Suit No. 35 of 1966 on 10-01-1966. In that suit, the learned advocates for both the parties have argued tooth and nail, and ultimately, the learned 5th Joint Civil Judge (J.D.) at Surat rendered his Judgment in Regular Civil Suit No.35 of 1966 which is on record at Ex.67, and the certified copy of decree passed in that suit is on record at Ex.82. In the present suit, plaintiff no.1 Ranjitlal Mansukhlal has given his evidence at Ex.29. In cross-examination, he was shown a bill for education cess issued by Surat Municipal Corporation for the financial year 1967-68. That bill is on record at Ex.71. Bill is issued in the name of plaintiff no.1, wherein it is stated that present defendant Maganlal Motiram is a tenant. In column of type of Use, it is mentioned "Milk Dairy and Residence", and therefore, since 1969, the defendant is using the suit premises for his business purpose as well as residential purpose. When plaintiff was shown this bill

Mark 59/2, i.e. Ex.71, his attention was drawn that there is a recital in said bill that premises let to defendant are being used for milk purpose and residence. He has not denied that bill, and therefore, when bill for this education cess was issued, plaintiffs did not take any objection, and objection was only taken before the Surat Municipal Corporation, stating, inter alia, that " that facts stated with regard to defendant are not correct", and therefore, it can be well inferred from this document Ex.71 that defendant is using suit premises for both the purposes "business as well as residence".

25. Ms. Kalpanaben Brahmbhatt has further argued that the contentions with regard to use of the suit premises as Diary use were taken in Regular Civil Suit No.35 of 1966. On reading the judgment rendered in Regular Civil Suit No.35 of 1966 which is at Ex.67, we find that question with regard to change of user was discussed by the learned Judge of the trial court in his judgment rendered in Regular Civil Suit No.35 of 1966. In Para 12 on Page 29 of that Judgment, there is a reference of previous suit i.e. Regular Civil Suit No.31 of 1961. It is stated that the previous suit bearing Regular Civil Suit No.31 of 1961 was also compromised and plaintiff accepted the defendant as tenant at enhanced rate by increasing rent by Rs.20/- per month. In another Para 12, (there is a duplication of giving Para 12 in said Judgment), copy of which is at Ex.67 on Page 22, it is observed by the learned Judge of the trial Court as follows:

" While if the defendant is evicted, it would be an uphill task for him to procure a suitable premises where he can carry on his business and also for residence in one and the same premises. He has deposed that inspite of such searching for a house, he could not get it. The defendant and his family would be put to considerable hardships, if ordered to vacate".

And therefore, in Regular Civil Suit No. 35 of 1966, the Court accepted the contention of defendant that he was using the suit premises for both purposes -one for business and other for residence. Ms. Kalpanaben Brahmbhatt has further argued that when point with regard to use of suit premises by defendant for Dairy purpose was decided in Regular Civil Suit No.35 of 1966, now the plaintiff cannot agitate the same point in the present suit i.e. Rent Suit No.39 of 1989, and therefore, principles of res judicata will operate against the plaintiffs so far as this point is concerned with regard

to use of suit premises by the defendant for Dairy purpose.

26. From the aforesaid document, it is crystal clear that defendant is using suit premises within the knowledge of plaintiffs for both the purposes -one for carrying on his business and another for his residence since 1967, and inspite of that fact, the present suit was filed, and though plaintiffs were in know of the fact that the defendant is using the suit premises for both the purposes, they took same contention in the present suit, when in earlier suit that point was finally decided. Principle of waiver will estop him from taking the same contention in the present suit.

27. From the judgment delivered in Regular Civil Suit No. 35 of 1966, it is crystal clear that defendant is using the suit premises for Dairy purpose and residence since 1967 within the knowledge of the plaintiffs, now it cannot be said that defendant has changed its use of the suit premises.

28. On the aforesaid point, Ms. Kalpanaben Brahmbhatt cited an authority of LUHAR JAGJIVANBHAI RAMJIBHAI vs. MUKUNDLAL PITAMBARLAL SHAH, reported in 1987 (1) GLH 395. As per the facts of that cited case, "reasonable cause for using the suit premises for the purpose of business was clearly established by the conduct of the landlord over number of years and in implied consent of the landlord of the same". In that case, the suit premises were the Godown let to tenant of that case. It was found by the plaintiff that the suit premises were being used for the purpose of business of Blacksmith by installing of Bhathi and Chimney, and therefore, plaintiffs had brought that suit on the ground of change of user from Godown to prime business of blacksmith. In that case, the defendants carried on business of blacksmith in the premises almost from the beginning of the tenancy with full knowledge and necessary implied consent of the landlord who used to collect the rent. The Court held that-

> "The landlord having permitted or having allowed the business to use of the premises right from 1956 or 1957 onwards, it is not open to the landlord to come to the Court after 15 years and complain about change of user and seek decree for possession on such ground".

The Court refused to grant decree on that ground of change of user in that case.

29. Here in this case also, the facts are practically similar to that of cited case. In the year 1967, when the judgment was rendered in Regular Civil Suit No.35 of 1966, the Court observed that defendant was using the suit premises for his business and also for residence. That use continued till 1981 when the present suit was filed, and therefore, it can be said that plaintiffs allowed the defendants to use the suit premises which was for both the purposes -one for Diary business and another for Residence. Under the circumstances, the case of plaintiffs so far as case under Sec.13(1)(k) of the Act is concerned, is not proved on the basis of evidence which has been led by both the parties in that suit. The learned Appellate Judge has not considered this evidence which I have discussed hereinabove. When there is documentary evidence on record, the learned Appellate Judge ought to have considered that evidence and then he ought to have come to a conclusion for his decision.

29.1 Under the circumstances, the finding arrived at by the learned Appellate Judge is prima facie perverse, because aforesaid evidence is not at all discussed, considered and dealt with by Appellate Judge, and therefore, on that score also i.e. his finding for case falling under Sec.13(1)(k) of the Act is not according to law.

30. Thus in view of what is discussed hereinabove, the judgment rendered by the learned Appellate Judge in no case can be said to be a judgment according to law, and therefore, this is a fit case in which this Court should come to a contrary decision, and therefore, this Civil Revision Application deserves to be allowed and the judgment rendered by the learned Appellate Judge which is challenged in this Civil Revision Application deserves to be set aside and accordingly, the Judgment Ex.19 dt. 14th December, 1989 rendered by the learned Appellate Judge in Regular Civil Appeal No.12 of 1986 is set aside. Rule is made absolute accordingly. Looking to the facts and circumstances of the present case, each party shall bear his own costs.

Date:10/8/2000. (H.H.MEHTA,J.)
ccshah